

**NO. PD-0012-19**

**IN THE COURT OF CRIMINAL APPEALS** FILED  
COURT OF CRIMINAL APPEALS  
7/23/2019  
DEANA WILLIAMSON, CLERK

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**THE STATE OF TEXAS**

**v.**

**DWAYNE ROBERT HEATH**

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On Discretionary Review From the  
Waco Court of Appeals  
Cause No. 10-18-00187-CR

**REPLY BRIEF FOR APPELLEE**

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**ORAL ARGUMENT REQUESTED**

## Table of Contents

Table of Contents .....	2
Index of Authorities .....	4
Issues Presented .....	5
Summary of the Argument in Reply .....	6
Argument .....	7
A. This Court does not have jurisdiction to address appropriate discovery sanctions because the court of appeals did not address that issue. ....	7
1. This Court has jurisdiction by discretionary review to review only decisions of the courts of appeals. ....	7
2. The court of appeals did not decide the “threshold question” the State seeks review of. ....	8
1. Did the court of appeals err by reversing the trial court’s discovery sanction order under a theory not raised by the State? .....	9
A. The State concedes that it did not complain about the adequacy of Appellee’s discovery request at trial or on appeal. ....	9
B. An appellate court may not reverse based on unpreserved theories. ....	10
2. Was Appellee’s discovery request sufficient under the Michael Morton Act? .....	11

3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?.....	12
Prayer .....	13
Certificate of Compliance .....	14
Certificate of Service .....	14

## **Index of Authorities**

### **Texas Cases**

<i>State v. Bailey</i> , 201 S.W.3d 739 (Tex. Crim. App. 2006) .....	10
<i>State v. Heath</i> , No. 10-18-00187-CR, 2018 WL 5660945 (Tex. App. – Waco Oct. 31, 2018, pet. filed).....	10
<i>Stringer v. State</i> , 241 S.W.3d 52 (Tex. Crim. App. 2007) .....	8

### **Texas Constitution**

TEX. CONST. art. V, § 5 .....	7
-------------------------------	---

### **Texas Statutes**

TEX. CODE CRIM. PROC. art. 44.45 .....	7
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### **Rules**

TEX. R. APP. P. 38.1(f).....	9
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### **Treatises**

43B GEORGE E. DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 57:35 (3d ed. 2011) .....	8
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## **Issues Presented**

1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?
2. Was Appellee's discovery request sufficient under the Michael Morton Act?
3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?

## Summary of the Argument in Reply

The State asks this Court to render an advisory opinion on the issue of appropriate discovery sanctions. Although Appellee is vitally interested in the answer to that question, this Court's jurisdiction is limited to the review of **decisions** by the courts of appeals. The court of appeals made no decision regarding appropriate discovery sanctions though that issue was fully briefed by the parties. Because the court of appeals did not decide that issue, this Court has no jurisdiction to address it (and did not grant review on that issue).

The State concedes that it has never challenged the adequacy of Appellee's discovery request at trial, before the court of appeals, or before this Court. This concession is dispositive of two of the issues before the Court.

However, both the State and Appellee urge the Court to address the propriety of the discovery request and establish for Texas trial courts, prosecutors and defense attorneys what constitutes a proper discovery request under the Michael Morton Act. This is the heart of Appellee's second ground for review.

## **Argument**

- A. This Court does not have jurisdiction to address appropriate discovery sanctions because the court of appeals did not address that issue.**

The State commences the argument in its brief by asking the Court to address a “Threshold Question,” namely what remedy can be applied to non-compliance with a discovery request. However, the court of appeals did not address this issue in its decision. Because this Court’s jurisdiction is limited to review of decisions of the courts of appeals, it has no jurisdiction to address this so-called threshold issue. To do otherwise would be to render an advisory opinion.

- 1. This Court has jurisdiction by discretionary review to review only decisions of the courts of appeals.**

Under the Texas Constitution and the Code of Criminal Procedure, this Court’s jurisdiction is limited to reviewing decisions of the courts of appeals when it grants a petition for discretionary review. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. art. 44.45.

The Court’s jurisdiction to review “decisions” of the courts of appeals necessarily means that the Court has jurisdiction to review only issues that

have been actually decided by the court of appeals in a particular case. *See Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007).

The granting of a petition for discretionary review defines the scope of the Court's review and the matters that are before the Court for decision. 43B GEORGE E. DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 57:35 (3d ed. 2011).

**2. The court of appeals did not decide the “threshold question” the State seeks review of.**

Here, the court of appeals did not decide (or even address) what remedy is available for non-compliance with a discovery request. This Court thus has no jurisdiction to address this “threshold” issue. *See Stringer*, 241 S.W.3d at 59.

Further, the Court did not grant review on this issue. Accordingly, the issue is not before the Court.

The Court should decline to address the “threshold question” raised by the State.



**1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?**

The State's brief indicates its continued misunderstanding of the rules for preservation of complaints. The appealing party (here, the State) must preserve complaints for appellate review. Further, a court of appeals may address only assigned errors designated by issues or points of error in the appealing party's brief. The court of appeals decided this appeal on an issue that was not preserved by trial objection by the State or assigned as error in the State's appellant's brief. The court of appeals erred by doing so.

**A. The State concedes that it did not complain about the adequacy of Appellee's discovery request at trial or on appeal.**

In the State's response to Appellee's third ground for review, the State concedes that it has not "taken a position on this point" at trial or on appeal.<sup>1</sup> State's Brief at 19. The State thus concedes that it did not complain at trial or on appeal about the adequacy of Appellee's discovery request.

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<sup>1</sup> This concession further dispenses with the State's suggestion that the court of appeals properly exercised its authority to address this issue under Rule 38.1(f) which authorizes an appellate court to address "every subsidiary question that is fairly included" in an issue or point. *See* TEX. R. APP. P. 38.1(f). The issue of the adequacy of Appellee's discovery request was not "fairly included" in the single issue presented by the State in its brief in the court of appeals; it was not included at all.

**B. An appellate court may not reverse based on unpreserved theories.**

“[I]t is improper for an appellate court to reverse a case on a theory not raised at trial or on appeal.” *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006). Stated differently, an appellate court may not “reach out and reverse the trial court on an issue that was not raised.” *Id.* at 744.

Here, the court of appeals reversed the trial court’s discovery sanction order under the theory that Heath’s discovery request was inadequate to invoke the requirements of the Michael Morton Act. *State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945, at \*2 (Tex. App.—Waco Oct. 31, 2018, pet. filed). But the State concedes that it did not challenge the adequacy of the request at trial or on appeal. The State further concedes that “the Waco court **reached out**” to some degree to find the discovery request inadequate. State’s Brief at 18. The court of appeals thus erred by reversing on this basis. *Bailey*, 201 S.W.3d at 743-44.

**2. Was Appellee's discovery request sufficient under the Michael Morton Act?**

The State concedes in its brief that it has not challenged the adequacy of Appellee's discovery request in either of the courts below and does not challenge its adequacy before this Court. Regardless, because the adequacy of the request was central to the decision of the court of appeals, Appellee urges the Court to construe the Michael Morton Act and clarify for the bench and bar what is required to constitute an adequate discovery request—which is the very basis for Appellee's second ground for review.

**3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?**

The State characterizes this ground for review as a “reiteration” of the first ground for review. Appellee suggests that estoppel is an alternative reason that the court of appeals erred by addressing the adequacy of his discovery request when that issue was not raised by the State. It is not a “reiteration” of the first ground for review. It is an independent reason the court of appeals committed error.

## Prayer

WHEREFORE, PREMISES CONSIDERED, Appellee Dwayne Robert Heath asks the Court to: (1) reverse the judgment of the court of appeals and remand this cause to that court for further proceedings; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett

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## **Certificate of Compliance**

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 1,701 words.

/s/ Alan Bennett  
E. Alan Bennett

## **Certificate of Service**

The undersigned hereby certifies that a true and correct copy of this corrected petition was served electronically on July 22, 2019 to: (1) counsel for the State, Sterling Harmon, [sterling.harmon@co.mclennan.tx.us](mailto:sterling.harmon@co.mclennan.tx.us); and (2) the State Prosecuting Attorney, [information@SPA.texas.gov](mailto:information@SPA.texas.gov).

/s/ Alan Bennett  
E. Alan Bennett